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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Respondent,
vs.
WERNER ERNST GREGG and ROSWITHA L. GREGG,
Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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STATEMENT

The Petitioners incorporate by reference the statement of the case and the statement of jurisdiction that are present in the original Petition.[1] The purpose of this Reply Brief is to address certain matters that were raised in the Government's Response thought to be inaccurate.

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1. Vol. ..... means trial transcript reference; M.S. Vol. ..... means Motion to Suppress transcript reference; M.S.E. means Motion to Suppress Exhibit; These references are part of record in the Eighth Circuit Court of Appeals; GB means Government's Brief in Opposition to Petition for Certiorari; Pet. at ..... means Joint Petition for Writ of Certiorari; Pet. App. ..... means Appendix to Joint Petition.

ARGUMENT

I.

The Petition Before the Court Should Not Be Held in Abeyance Pending the Decision of the California v. Greenwood Case.

The government suggests (GB at 7) that the validity of the searches of Petitioners' trash at the residence and place of business should be held pending the outcome of the case of *California v. Greenwood*, No. 86-684 (argued January 11, 1988) that is now pending before this honorable court. Petitioner Werner Gregg is presently incarcerated in the Medical Center for Federal Prisoners in Springfield, Missouri.[2] Petitioner respectfully states that should this Petition for Writ of Certiorari be granted, Petitioner in all likelihood will apply for bail from this honorable court. Further, since the Petitioner is now serving his period of confinement, justice requires that this matter be resolved as soon as possible. Thus, under these circumstances, it would be unfair to delay action on this Petition for Writ of Certiorari.

II.

The Seizure of the Telex Communications in This Cause As Well As the Execution of the Search Warrants Did Not Conform With the Particularity Requirements of the Fourth Amendment.

The United States in its Brief raises a number of reasons as to why the Application for Writ of Certiorari

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2. During the pendency of Petitioner Werner Gregg's appeal before the United States Court of Appeals for the Eighth Circuit, Werner Gregg was indicted on new charges related in part to the exportation of the laser navigational system. As a result of those new charges, Mr. Gregg's bond was revoked and the Eighth Circuit chose not to reinstate that bond. However, since that time, Mr. Gregg has been tried and acquitted on all those charges.

by Petitioners should not be granted. The government argues that Petitioners have abandoned their claim that Title III was applicable to the telex interception that occurred in 1984. (GB at 7). The government further claims that it is Petitioners' contention that the magistrate issuing the warrant was required to follow the statutory safeguards embodied in Title III. The government has in part misstated Petitioners' point while choosing to seek form over substance. Petitioners have always maintained the telex interceptions must comply with the particularity requirements of the Fourth Amendment. This is aptly stated in *Osborn v. United States*, 385 U.S. 323 (1966); *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). The government argues that the interception of the telexes in this case does not conflict with this Court's decisions in *Osborn v. United States*, *Berger v. New York*, and *Katz v. United States*. And yet, in each of those decisions some constraints were placed on how to obtain authorized interceptions of electronic communications. Regardless of whether Title III strictly applies to the telex interceptions at issue, some restraints in order to minimize the seizure should be required as suggested in *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985); *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986), *cert. denied*, No. 85-2108 (Oct. 6, 1986) and *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987).[3] The issue is a Fourth Amendment particularity issue rather than a strict interpretation of the applicability of Title III to telexes at the time

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3. The record is absolutely undisputed that there was no minimization of the telex interception. (Pet. at p. 5 especially Note 4; M.S. Vol. II at 371, 372). Also, the recent amendment of 18 U.S.C. Section 2510(4) now reads "aural or other" acquisition, Electronic Communications Privacy Act of 1986, see *Congressional Record*, Vol. 123, No. 134-Part II, Oct. 2, 1986, H8977.

of the interception. It is respectfully suggested that the same concerns regarding particularity and minimization addressed by the court in *Berger v. New York* apply in the instant cause. As indicated, the Second, Fifth and Seventh Circuits have addressed the issue of what particularity requirements of the Fourth Amendment should apply to other forms of electronic surveillance. In those cases in particular, television surveillance was involved. *Torres* held that Title III did not apply to other forms of electronic surveillance at that time. However, *Torres* and its progeny suggest that the safeguards of Title III should be used as a guidepost or an indicia of minimum standards in evaluating the Fourth Amendment particularity requirements in the context of electronic surveillance not covered by the wire tap statute. This is stated best in *Biasucci*:

> We likewise believe that these standards, borrowed from Title III, together with the more general constitutional requirements, form a sufficient outline of the showing the government must make before a warrant should issue authorizing video surveillance. Application for video surveillance should not be strictly judged by all of the other procedures and requisites of Title III, however, like the Seventh Circuit, we borrow the statutory standards quoted above as a measure of the government's constitutional obligation.

Biasucci at 510.

The government's theory is that the telex interceptions are much less intrusive than the television surveillance described in *Torres*, *Biasucci* and *Cueva-Sanchez*. (GB at 9). The telex interceptions were certainly as intrusive as the video surveillance in *Torres*. In *Torres*,

the government sought video surveillance of safehouses used by Puerto Rican terrorists. It was thought that those safehouses would be used only for the criminal conduct of making and constructing bombs. It was further felt that the terrorists themselves, fearing aural interception, would often plot in the safehouses without speaking audibly. Thus, the surveillance in *Torres* involved non-oral activities of the terrorist group, and only when individuals were present at the safehouses. By contrast, in this case well over half of the seized telexes involved legitimate conduct, but every telex was seized. (M.S. Vol. IV, pp. 625-654).

Further, some of the seized telexes contained references to non-business or personal communication.[4] The overseizure of telexes in this cause and the lack of minimization was described by the district court as "defendant's most cogent argument regarding particularity". (Pet. App. A35). The government also seems to labor under the impression that minimization was technologically impossible. (GB at 8). The only evidence on this issue at the Motion to Suppress was from two experts called by the Petitioners. Both individuals testified that such minimization was easily within the constraints of the technology at the time. (M.S. Vol. II, pp. 373-374; M.S. Vol. III at 467 and 468).

The government also questions Petitioners' contention that the telex interception orders as well as the description of the search warrants utilized to search the

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4. As cited both in Petitioner's Joint Petition and in the transcript of the Motion to Suppress, Volume IV, pp. 625-654, Petitioner in this cause had a lawyer, Kenneth Doyle, trained in customs law, review the telex in this cause. His review indicated that there were 3,459 telex communications seizures and he only found 1,236 which involved companies or products involving illegalities named in the affidavits that allowed the interception itself.

residence and business of Petitioners were overbroad and allowed a general search contrary to the precedents of this court and the various courts of appeals. (See GB at 10).

To evaluate this point, one must be aware of the actual scope of the seizures in this case. There were 3,459 telex interceptions alone. The seized documents filled close to 100 boxes and certainly numbered well into six figures. The agents themselves indicated the document seizure was done with the agents' "painting a broad brush". (M.S. Vol. III at 416). They admitted seizing virtually all of the business records. (M.S. Vol. III at 459, 505). In fact, the agents assumed all of the business records were subject to seizure. (M.S. Vol. III at 448). The seizure was so massive that nine months later the customs agents were still sorting through the documents to determine what was relevant. (M.S. Vol. III at 459). Clearly the subjects of overseizure, lack of minimization, and lack of particularity were the major emphasis of the Eighth Circuit briefs, the oral argument, and the Motion for Rehearing. Yet, the Court of Appeals failed to even address these issues.

The government cites two cases which stand for the proposition that a warrant may describe a broad category of documents, when a more precise description of items to be seized is not possible. See, *Williams v. Kunze*, 806 F.2d 594, 598 (5th Cir. 1986); *United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984). (See also, GB at 10). These cases are distinguishable from the matters that are before this court. In *Gomez-Soto*, the evidence indicated that virtually all of the defendant's business was related to the sale of narcotics. Here the record shows that Petitioners were involved in substantial legitimate transactions. Further,

one portion of the description in the warrant in *Gomez-Soto* was found to be invalid. That provision called for the seizure of evidence demonstrating failure to file currency transaction reports. Such a description is very close to the kind of description that arose in regards to the search warrants in this cause. In *Gomez-Soto* officers were exercising their discretion to determine what documents demonstrated failure to file currency transaction reports. In this case, the search warrant description allowed the seizing officers to use their discretion in determining what items should be seized.[5] In *Williams v. Kunze*, the search warrant was limited to what was described by the Fifth Circuit as "to seven specifically described categories of documents" and again does not appear to have relied on generic references to broad federal statutes.

The government in its own brief, inadvertently demonstrates Petitioners' point very aptly. On p. 10 of that brief it is stated as follows:

> Contrary to Petitioners' assertion, the warrant did not allow the seizure of 'all business documents of Gregg International. Rather the warrant was limited to documents that consist of sales, invoices, shipping papers, purchase order, correspondence, payment records, and telex relating to the purchases, sale, storage, transportation, financing of merchandise exported or to be exported from the United States' in violation of several export administration regulations, federal statutes and executive order.

(See generally, GB at 10; Pet. App. 40 Note 8).

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5. The warrants in this cause referenced only broad criminal statutes touching upon complex doctrines of export law. (Pet. at 5, 6).

However, the testimony was that with such description the government did in fact seize virtually all of the business documents of Gregg International. (M.S. Vol. III at 448; M.S. Vol. IV at 505; M.S. Vol. III at 416). This poignantly demonstrates Petitioners' point. The overlybroad description caused a general seizure of all the records. The seizure included random confiscation of such items as laundry lists, Kansas City Chiefs football tickets, blank checks, personal diaries as well as every piece of paper imaginable. (M.S. Vol. III at 431-444). See, *Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985).

III.

The Writ Should Be Granted Because the Failure of the District Court to Allow the Admission of the Expert Testimony and the Accompanying Regulations Denied Petitioner His Rights of Compulsory Process As Guaranteed to Him Through the Sixth Amendment and Due Process of Law As Guaranteed to Him Through the Fifth Amendment.

At the trial of this cause, Petitioner Werner Gregg unsuccessfully attempted to introduce into evidence various export regulations. Petitioner's legal arguments for the admission of that evidence are contained in pp. 22-24 of the original Petition in this cause and the same does not need to be restated.

However, the Petitioner desires to rebut certain factual points. (GB at 13). The exportation of avionic equipment generally requires the use of export licenses issued either by the Department of Commerce or the Department of State. The Petitioner Werner Ernst Gregg possessed over 40 such licenses. There is a well estab-

lished concept in the area of export administration called the "dual use exception".[6] Generally, if a commodity has both a commercial and military use, then, the Department of Commerce is responsible for the export licensing.

Petitioner at trial attempted to show that the regulations involving the licensing of the questioned exported items were subject to various interpretations and that he did not specifically intend to violate the export laws. Admittedly, there was substantial evidence that Werner Ernst Gregg possessed a variety of export licenses. However, the relevant question was whether he knowingly and willfully used the inappropriate license.[7]

CONCLUSION

For the reasons stated herein as well as those addressed in the original Joint Petition for the court, the Petitioners' Application for Writ of Certiorari should be GRANTED.[8]

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6. A closely related concept is the normal commercial use exception. Both the "dual use" and "normal commercial use" doctrines were briefed and argued in the Eighth Circuit. (See Joint Addendum filed by Petitioners).

7. The government was allowed to offer opinion evidence or to the licensing requirements of the various charged items. However, the Petitioner was denied this same right. As stated in the Joint Petition the exclusion of this evidence and the Eighth Circuit's rationale for the same offended constitutional doctrines of compulsory process and confrontation of evidence against the Petitioner as guaranteed by the Sixth Amendment; his Fifth Amendment right to remain silent; and the improper shifting the burden of proof as protected by the doctrine of due process of law. (See generally, Pet. 24).

8. There are certain factual inaccuracies in the government's response that Petitioners specifically ask be rebutted. The government argues that Werner Ernst Gregg was convicted of attempting to export a laser inertial navigational system without a Commerce Department license. (GB at 2). At the time of the seizure of that item, Werner Gregg did possess a GTE license issued by the Department of Commerce. (M.S.E. at 107-

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Respectfully submitted,

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Footnote continued—

109). Petitioner Werner Gregg has always indicated that he intended to use the GTE license in exporting that piece of equipment. (Vol. V, at 83-85). Further the government argues Werner Gregg did not dispute that he had exported or attempted to export the items that were charged. (GB at 5). Two counts of the indictment involved the exportation of Litton night vision goggles and a TOW missile system. Although Werner Gregg did not testify in this trial, he has always indicated that the exportation of those two items was accomplished by an employee of his, George Byram. (Vol. III, pp. 37, 189-191). The remaining counts did involve Petitioner's defense that he did not have any specific intent.